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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re D.N.,

a Person Coming Under the Juvenile
Court Law.

B209748

(Los Angeles County
Super. Ct. No. CK68202)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

R.N.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Elizabeth Kim, Juvenile Court Referee. Affirmed.

Diana W. Prince, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and Kirstin J. Andreasen, Senior Associate County Counsel, for Plaintiff and Respondent.

INTRODUCTION

R.N. (Mother) appeals from an order terminating jurisdiction over her minor daughter, D.N. (Daughter), and ordering that Daughter's primary residence be with the child's father, A.M. (Father). Mother contends the trial court abused its discretion in ordering Daughter's placement with Father. We affirm.

FACTS

On May 16, 2007, the Department of Children and Family Services (DCFS) detained one and one-half year old Daughter. DCFS and the police responded to the maternal grandparents' home after they reported that Daughter had been physically abused.

The maternal grandfather picked Daughter up from Mother's house and saw that the child had two black eyes. Mother said she had fallen on the side of the pool. The maternal grandmother saw bruises on Daughter's face and arm and did not believe Mother's explanation. She took Daughter to the police, who told the maternal grandmother to have the child examined by a doctor to confirm physical abuse. After the examination, the police and a Children's Social Worker (CSW) went to the maternal grandparents' home.

The maternal grandparents reported that a month earlier, Daughter was hit in the face when Mother's live-in boyfriend, J.E. (Boyfriend), threw a shoe during an argument with Mother. Mother and Daughter stayed with the maternal grandparents overnight, but Mother returned to Boyfriend the following day, taking Daughter with her, although the grandparents begged her to let Daughter stay with them.

Mother spoke to the CSW by telephone. She said that on May 10, Boyfriend came home late and intoxicated. She was upset and took out her anger on Daughter, slapping Daughter in the face. She felt better, until she saw the bruises appear on Daughter's face.

Mother claimed she hits Daughter because the maternal grandmother hit her when she was a child. Mother claimed that she did not have a problem with anger; she was unable to control her emotions because she was pregnant.

Mother acknowledged that Boyfriend had thrown a shoe which hit Daughter in the face, but she explained that Boyfriend did not know Daughter was there when he threw the shoe. Mother said she had been with Boyfriend for nine months; she loved him and would never leave him. The CSW requested an interview with Boyfriend. He refused.

The CSW asked for contact information for Daughter's father. Mother refused to disclose it, claiming she did not want him to be contacted because he had abandoned her.

DCFS filed a petition under Welfare and Institutions Code section 300 (section 300), subdivisions (a) and (b), alleging Daughter was at risk due to Mother's physical abuse and domestic violence between Mother and Boyfriend. At the detention hearing, Mother identified Father and said that he was in the Army. The juvenile court found a prima facie case for detention. It also ordered DCFS to attempt to locate Father. Thereafter, it ordered Daughter detained with her maternal cousins.¹

In a subsequent interview, Mother denied any domestic violence. She explained that Boyfriend only pushed her. When he threw the shoe, he did so because he was upset with Mother, but he did not mean to hit Daughter. Mother minimized the injury to Daughter from the incident. Mother stated that she planned to stay with Boyfriend, but they agreed to take classes.

Mother acknowledged slapping Daughter "really hard" one time. Other than that one time, she only spanked Daughter on her bottom. Mother claimed physical abuse as a child and a rape as a teenager caused her to attempt suicide, which resulted in a psychiatric hospitalization. Mother said she had enrolled in a parenting class, and anger management and domestic violence counseling on May 23.

¹ The maternal cousins lived in the home of a maternal aunt, and Daughter shared a bedroom with the aunt.

Boyfriend said he drank alcohol and smoked marijuana, but he denied having a problem. Mother acknowledged that Boyfriend smoked marijuana several times a day. In response, DCFS filed an amended petition adding an allegation under subdivision (b) of section 300 as to Boyfriend's marijuana use.

At the June 18, 2007 jurisdictional/dispositional hearing, the juvenile court sustained the section 300 petition and declared Daughter a dependent child of the court. It ordered Mother to participate in parenting education, domestic violence and individual counseling, and anger management. It also granted Mother monitored visitation.

By the September 19 progress hearing, Mother had completed 12-week parenting education and domestic violence programs, and 12 sessions of anger management. She had not begun individual counseling. She still lived with Boyfriend, and he had not participated in any programs. Mother visited Daughter at the maternal cousins' home at least three hours a week.

DCFS had located Father, who stated that he wanted full custody of Daughter. He spoke with Daughter by telephone once a week. He lived on a Marine base in North Carolina and had petitioned for appropriate housing and childcare. DCFS recommended that he take a paternity test and receive reunification services.

The juvenile court granted Mother unmonitored visitation at the maternal cousins' home, but due to concern over Boyfriend's failure to participate in any programs, it required monitored visitation outside of the home.

Paternity tests confirmed that Father was Daughter's biological father. Father visited her in early October, and Daughter began to bond with him. On October 30, Father moved for presumed father status. He also contacted Mother and offered to support and co-parent Daughter, but Mother told him that she did not want him in Daughter's life. Father indicated that he was willing to give temporary custody of Daughter to the maternal aunt, give her money every month for Daughter's support, and agree to visitation with Mother.

In mid-October, Mother gave birth to a second child, a boy. Because Mother was complying with her case plan, DCFS did not detain him but initiated a voluntary family maintenance plan for him. DCFS ordered Boyfriend to participate in a domestic violence program, parenting education and random drug testing.

At a contested paternity hearing on November 13, 2007, Mother agreed to presumed father status for Father if Daughter stayed with the maternal aunt. The juvenile court granted Father presumed father status. It placed Daughter with Father, but because he was being deployed to Iraq, the placement was conditioned on Daughter remaining with the maternal aunt and cousins.

Just prior to the contested paternity hearing, Father's girlfriend gave birth to a daughter. Father and his girlfriend were married on November 17.

On December 17, DCFS reported that Mother continued to live with Boyfriend, who still was not participating in any programs. Mother had not participated in individual counseling due to her pregnancy, which made it difficult to take the bus to counseling. She continued visitation with Daughter every weekend, and Daughter looked forward to the visits. Mother also spoke with Daughter by telephone several times a week.

DCFS also reported that a skeletal survey revealed that Daughter had old fractures of her arm and collarbone. The Los Angeles Police Department was pursuing criminal charges against Mother, and she was scheduled to appear in criminal court on December 18.

DCFS noted that Daughter continued to live with her maternal aunt and cousins. Father spoke to her by telephone every day. He and his wife visited her whenever they were in California. Daughter enjoyed spending time with Father's wife. Wife was willing to care for Daughter while Father was deployed in Iraq. DCFS recommended that Father receive full legal and physical custody of Daughter, that Mother's reunification services be terminated, that Mother be granted visitation and that jurisdiction be terminated.

Mother requested a contested hearing, and it was scheduled for January 14, 2008. For the hearing, DCFS reported that Mother still had not participated in individual counseling, but she was on the waiting list. Boyfriend had not participated in any of the programs required under the voluntary family maintenance plan. Mother said that if he continued to refuse to participate, she would leave him and live with her parents. DCFS recommended that Mother receive another six months of reunification services.

At the contested hearing, all parties agreed that Daughter would live with Father's wife. Mother would have unmonitored visitation three times a week and another six months of reunification services.

For the July 14, 2008 hearing, DCFS reported that Daughter was living with Father's wife, who treated her as her own child. Daughter was doing well. The wife facilitated visitation with Mother and other relatives. Father spoke to Daughter by telephone. Daughter said she loved Mother, Father, his wife, and Daughter's two half-siblings.

Mother had attended 12 individual counseling sessions. She had been having overnight visitation with Daughter. The voluntary family maintenance plan for her son had been closed.

DCFS recommended that jurisdiction be terminated, with Father having Custody of Daughter and Mother receiving visitation. DCFS noted that Mother was inconsistent in returning Daughter at the scheduled time after visitation; it was concerned that if Mother had custody of Daughter, she might interfere with Father's visitation. The juvenile court continued the matter to allow the parties to agree to a family law order. DCFS recommended that Daughter's primary residence be with Father, and that Mother have her every other weekend plus certain holidays.

At the hearing, Mother testified that she had primary care of Daughter the first year and a half of Daughter's life. During that time, Father never visited Daughter. Since Daughter was declared a dependent child of the court, Mother had completed her case plan and visited with Daughter. She had learned how to better care for Daughter.

Mother testified that she was still living with Boyfriend. He was participating in parenting education. He had not enrolled in a domestic violence program. Mother was not concerned, in that he was not violent with her and she did not believe he would be violent with Daughter.

Mother argued that because she was the previous custodial parent, had completed her case plan, and Father was in Iraq, Daughter should be placed with her. The juvenile court gave Mother and Father joint legal and physical custody, with Daughter's primary residence to remain with Father. Mother was to have Daughter every other weekend and specified holidays. The court terminated jurisdiction.

DISCUSSION

Mother contends the juvenile court erred in placing Daughter in Father's care, in that (1) mother completed all aspects of her reunification and voluntary family maintenance plans, and (2) it was in Daughter's best interests to be placed with Mother. We disagree.

When a dependent child has been placed with a parent in a safe, stable home, and there no longer is any reason for court supervision, the juvenile court may terminate jurisdiction and issue a family law order which is in the child's best interests. (Welf. & Inst. Code, § 361.2, subd. (b); *In re Nicholas H.* (2003) 112 Cal.App.4th 251, 268.) We review the court's order for abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)² Discretion is abused when the court's order exceeds the bounds of reason, is arbitrary, capricious or patently absurd. (*Id.* at pp. 318-319.)

In addressing an appeal, we begin with the presumption that the decision of the lower court is correct. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133;

² Contrary to Mother's claim, *In re John W.* (1996) 41 Cal.App.4th 961, 972 does not hold that the family law order is reviewed under the substantial evidence standard. It merely refers to substantial evidence supporting an order.

Fleishman v. Superior Court (2002) 102 Cal.App.4th 350, 357.) Thus, we view the evidence and draw all reasonable inferences in favor of the juvenile court's order; we have no power to substitute our decision for that of the juvenile court. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 319.) The appellant has the affirmative burden of establishing an abuse of discretion. (*In re Marriage of Gonzalez* (1976) 57 Cal.App.3d 736, 749.)

When making an order to place the child in the home of a parent, the primary consideration is the child's best interests. (*In re Nicholas H.*, *supra*, 112 Cal.App.4th at p. 268.) If the child may be placed in the home of either parent, the court must decide in which home the child should be placed. (*Id.* at p. 267.)

The child's best interests have been defined as "'an elusive guideline that belies rigid definition.'" (*In re Ethan N.* (2004) 122 Cal.App.4th 55, 66.) Factors that go into a determination of a child's best interests include the gravity of the problem leading to the dependency proceedings; the parents' past history and current efforts and fitness; the strength of the bonds between the child and the parents; the parents' emotional stability; the regularity of parental visitation; the parents' behavior during visitation; and the child's success in the current placement. (*Id.* at pp. 66-68.)

It is clear that the juvenile court's order giving primary physical custody of Daughter to Father does not exceed the bounds of reason and is not patently absurd. Daughter had been living in Father's home for the last six months. Father's wife treated her as her own child and took good care of her. The wife also facilitated visitation with Mother and other maternal relatives. Daughter was doing well. She loved Father, his wife, and her half-sister with whom she lived. There is nothing unreasonable or absurd about allowing Daughter to remain in this home, which would maintain stability in her life and allow her continued contact with all the important people in her life. In order to overcome the presumption that the juvenile court's order was correct, Mother must prove that the order was arbitrary or capricious and therefore an abuse of discretion.

Mother first points out that the juvenile court continued reunification services even after Daughter was placed with father, with the obvious goal of eventual reunification.

She also points out that she completed all the requirements of her reunification plan. Additionally, because DCFS terminated the voluntary family maintenance plan as to Daughter's half-brother, DCFS must have determined that Mother's home was safe.

With these points as a backdrop, Mother argues, in essence, that the juvenile court must have failed to consider Daughter's best interests in placing her with Father. This is because Daughter spent most of her life in Mother's care, is bonded to Mother, and there is no evidence Mother would refuse to facilitate visitation between Daughter and Father.

Daughter spent the first half of her life in mother's care, but she was removed from Mother's custody due to physical abuse by Mother. It is true that Mother completed her reunification and voluntary family maintenance plans and had learned from her programs about how better to care for Daughter. However, Mother was still living with Boyfriend, who previously had injured Daughter, albeit inadvertently, in an incident of domestic violence. He only began to participate in programs after a voluntary family maintenance plan was instituted for his own child. He never enrolled in a domestic violence program. Mother was not concerned about this, insisting that he was not violent with her and would not be violent with Daughter. Under the circumstances, that Mother had completed her reunification and voluntary family maintenance programs does not establish that Daughter's best interests would be served by placing primary custody with Mother. (Cf. *In re Joseph B.* (1996) 42 Cal.App.4th 890, 901.)

Mother claims the juvenile court erroneously believed it was required to place Daughter with Father, in that she was living with him at the time the court made its decision. The record does not support Mother's claim.

Mother's counsel was arguing that Mother should be the one with whom Daughter should be placed. He argued that since Father was in Iraq, "[w]e're basically allowing placement with the stepmother at this point to trump the mother's rights when she's done everything [required in her case plan]." The trial court noted, "[T]he father was available and was an appropriate parent when the mother was not; and so, that is why this child is with this parent."

The trial court was merely responding to counsel's argument regarding Daughter living with her stepmother while Father was in Iraq. In no way can the trial court's statement be considered a statement of belief that the trial court was required to place daughter with Father.

Mother next argues that the juvenile court abused its discretion because it is in Daughter's best interest to be placed with her. Indeed, there is substantial evidence in the record, which Mother recites, which would support a finding that it is in Daughter's best interests to be placed with Mother. That is not the question before us, however. We must determine whether the trial court abused its discretion in placing Daughter with Father; we cannot substitute our determination of Daughter's best interests for that of the juvenile court. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 319.)

Mother further claims that that there is no evidence to support DCFS's rationale for recommending that Daughter be placed with Father: Mother's inconsistency in returning Daughter on time following visitation suggested that she might not facilitate visitation between Daughter and Father.

DCFS explained that its "decision to give father primary custody of the minor is based on the fact that the minor has been residing under stepmother's/father's care for a period of six months, and mother's inconsistency with returning the minor when scheduled." DCFS believed that "because mother has been inconsistent with returning the minor, if mother is given primary custody of the minor, this may in turn result in the possibility that father may not be given his visitation as scheduled. If the minor is under stepmother's/father's care, stepmother can guarantee that the minor will . . . at least have regular telephone contact with her father while he is deployed. . . . Furthermore, under father's care, paternal relatives were given the opportunity to interact with the minor; there is no guarantee that mother will allow paternal relatives to have contact with the minor. During these past six months of supervision, stepmother has allowed both paternal and maternal relatives to interact with the minor. Stepmother has facilitated the interaction between maternal and paternal relatives. The minor appears to have positive

interactions with both sets of relatives. It would be in the best interest of the minor that she should be allowed to have contact with her relatives as they appear to have bonded with the minor as well.”

While DCFS could merely speculate that Mother might not facilitate visitation with Father and the paternal relatives, it had evidence that Father, through his wife, would facilitate visitation with Mother, with her relatives, and between both sets of relatives. Father and his wife having proven that they could take good care of Daughter and would facilitate her visitation with her relatives on both sides of the family. We cannot say that the juvenile court’s determination to place primary custody with Father was arbitrary or capricious. It follows that its determination was not an abuse of discretion. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 318.)

Mother finally contends, in the alternative, that if the juvenile court did not abuse its discretion in failing to give her primary custody of Daughter, then it abused its discretion in refusing to give both parents equal custody. Her reliance on *In re John W.*, *supra*, 41 Cal.App.4th 961 in support of her contention is misplaced.

In *In re John W.*, *supra*, the court held that where the parents of a school-age child lived a substantial distance apart and in different counties, a joint custody arrangement would be unworkable. (41 Cal.App.4th at p. 974.) It did not hold that where the parents live near one another, joint custody is required. The court in fact noted that “just because custody with neither parent was held to pose any danger to the child does not mean that both parents are equally entitled to half custody.” (*Ibid.*) The child’s best interests is the deciding factor (*ibid.*), and Mother here has not shown that the juvenile court abused its discretion in determining that placing primary custody with Father was in Daughter’s best interests.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED

JACKSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.